

July 16, 2013

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123; *Misuse of Internet Protocol (IP) Captioned Telephone Service*, CG Docket No. 13-24

Dear Ms. Dortch:

In its recent Order and Notice of Proposed Rulemaking in this proceeding,¹ the Commission temporarily banned and proposed to permanently ban certain “referral programs” for IP Captioned Telephone Service (IP CTS). As explained in the NPRM, the Commission was concerned that these referral programs—which generally offer rewards to IP CTS customers, members of the public, and audiologists—could result in some customers signing up for IP CTS service even though they do not need it.² As explained in prior filings, Sorenson does not believe that these concerns are supported by the record. However, if the Commission nevertheless decides to move forward with banning referral fees, Sorenson is concerned that the proposed rule could be read to prohibit a wide variety of conduct that the Commission never intended to prohibit. Because a broad interpretation of the rules will chill constitutionally protected commercial and noncommercial speech, the Commission must take steps to narrowly tailor its prohibition so as to comply with the First Amendment.

Both the temporary and proposed rules ban all forms of “direct or indirect inducements, financial or otherwise, to . . . encourage subscription to or use of IP CTS.”³ Read literally, this language could potentially bar *any* form of advertisement or marketing, since all advertisement involves a “direct or indirect inducement” (e.g., a payment) to some “person or entity” (radio or television station, or to a newspaper, magazine, or website) in order to “encourage subscription

¹ *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order and Notice of Proposed Rulemaking, 28 FCC Rcd. 703 (2013) (“NPRM”).

² *Id.* at 710-11 ¶¶ 13-14.

³ *Id.* at 732 ¶ 56; *id.* at 745 (proposing 47 C.F.R. § 64.604(c)(8)).

to or use of” IP CTS.⁴ Not only would such a reading make no sense—the Commission even requires carriers to “educate the public about TRS” and to ensure that “callers in their service areas are aware of the availability and use of all forms of TRS,”⁵—but it would also violate the First Amendment.

Although the Commission likely does not intend to ban all advertising related to IP CTS, the interim and proposed final rules generate uncertainty among IP CTS providers because these rules could be construed to prohibit all advertising. That vagueness “raises special First Amendment concerns because of its obvious chilling effect on free speech.”⁶ Moreover, that chilling effect is especially pronounced here because an IP CTS provider risks losing *all* of its IP CTS compensation if it is deemed to have provided a prohibited referral fee. In short, given the “vague contours” and harsh penalties of the regulation, “it unquestionably silences some speakers whose messages would be entitled to constitutional protection.”⁷

Of course, if the Commission did intend such a broad interpretation of the regulation, the regulation would undoubtedly violate the First Amendment. To begin, such a sweeping reading of the rule would unavoidably affect *noncommercial* speech. As the Supreme Court has explained, the “mere fact” that speech is an advertisement does not make it commercial speech.⁸ Nor does a “reference to a specific product” or the fact that the advertiser “has an economic motivation” for the advertisement, standing alone, make an advertisement “commercial speech.”⁹ Thus, it is easy to imagine IP CTS advertisements that would contravene the broadest possible reading of the rule but that would nonetheless qualify as noncommercial speech. For example, if an IP CTS provider paid for advertisements explaining the benefits of IP CTS service without mentioning any particular IP CTS brand or product, such an advertisement could qualify as noncommercial speech even though it might indirectly “encourage subscription to or use of” IP CTS service.

⁴ 47 C.F.R. § 64.604(c)(8)(i).

⁵ 47 C.F.R. § 64.604(c)(3)

⁶ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

⁷ *Id.* at 874; *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2743 (2011) (“Vague laws force potential speakers to “steer far wider of the unlawful zone” ... than if the boundaries of the forbidden areas were clearly marked.” (Alito, J., concurring) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (alteration in *Brown*)).

⁸ *See Bolger v. Youngs Drug Prods Corp.*, 463 U.S. 60, 66 (1983) (“The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.”); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (“In *Fox*, we described the category [of commercial speech] even more narrowly, by characterizing the proposal of a commercial transaction as ‘the test for identifying commercial speech.’”) (emphasis in *Discovery Network*).

⁹ *Id.* at 66-67.

Such a restriction on noncommercial speech cannot withstand First Amendment scrutiny. Because the rule may be read to prohibit speech because of its message—*i.e.* because it encourages consumers to use IP CTS service—the restriction would be subject to strict scrutiny.¹⁰ To withstand strict scrutiny, the Commission would have to prove that its rule (1) serves a compelling government interest; (2) is narrowly tailored to serve that interest; and (3) is the least restrictive alternative to serve the compelling interest.¹¹

The Commission's proposed rule fails all three prongs. First, the Commission's purpose in passing the rule is not compelling because the alleged harms from referral payments are merely imagined by the Commission and have no support in the record. There is, for example, no evidence that referral fees paid to audiologists or hearing-instrument specialists cause any harm whatsoever. Indeed, in order for the kind of harm that the Commission envisions—use of IP CTS by “individuals who do not need the service”—to arise from such referrals, the Commission would have to believe that CaptionCall's extremely modest referral payments to these health-service providers (on the order of \$100 per month on average) were causing audiologists to behave unethically by referring patients who do not require the service. That belief is highly implausible and finds no support in the record.

Nor is the rule narrowly tailored to address the supposed harm caused by those payments. Although the harms articulated by the Commission relate to the unauthorized use of IP CTS service by consumers who do not need it,¹² the proposed rule can be read in a way that prohibits far more than the Commission's theoretical unauthorized use, as explained already. Not only could the rule potentially ban any form of advertisement; it could also be read to bar ordinary wholesaler or dealer relationships in which the manufacturer sold products to a dealer at a wholesale price, which the dealer then resold at a higher price, because the retail mark-up “induced” the dealer to sell (*i.e.*, “encourage subscription to”) IP CTS. Nothing in the Commission's interim Order indicates an intent to reach either advertising or ordinary wholesale and dealer arrangements—or any harms caused by such arrangements. Likewise, the rule could be read to ban co-operative marketing practices, where an IP CTS provider and audiologist jointly fund marketing campaigns to shared bases of potential customers and patients that are not tied to the number of referrals made. These cooperative arrangements to disseminate speech are routine in virtually every sector of the economy and present no risk of ineligible IP CTS usage, yet they could conceivably be viewed as “indirect” efforts to “encourage subscription to” IP CTS.

Finally, the rule is not the least restrictive method of addressing the Commission's interests. To the extent that the Commission is concerned about referral fees paid to audiologists or other financial incentives paid to consumers to use IP CTS, it can ban those specific practices without adopting a rule so broad that it could be viewed as banning all IP CTS advertising.

¹⁰ *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (“Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.”).

¹¹ *See id.*

¹² NPRM at ¶¶ 13-15.

While referral-fee bans may be unsupported by the record, they would not raise the First Amendment problems created by the current proposed rule.

The proposed rule could also be read to restrict commercial speech, which would violate the First Amendment, as well. To justify a restriction on commercial speech, the Commission would—at a minimum—have to meet the test articulated in the Supreme Court’s *Central Hudson*¹³ decision, which requires the government to (1) prove the existence of a “substantial” government interest; (2) show that “the restriction directly and materially advances that interest”; and (3) show that the restriction is “narrowly tailored.”¹⁴ Once again, however, the proposed regulation fails all three prongs. First, the Commission has failed to demonstrate it has a “substantial interest” because there is no evidence in the record that there is actually any widespread misuse of IP CTS that the Commission needs to address.¹⁵ Indeed, there is no evidence in the record that IP CTS is being used by a substantial number of “individuals who do not need the service”—or any evidence that any harms arise from referral fees paid to audiologists or hearing-instrument specialists. Second, there is an insufficient connection between the sorts of harm targeted by the regulation—*i.e.*, the use of IP CTS service by those who do not need it—and the regulation itself because, once again, there is no evidence that small referral fees cause audiologists to recommend IP CTS to patients who do not need it.¹⁶ Absent such evidence, the Commission would have to simply *assume* that extremely modest referral payments are causing audiologists to behave unethically by referring patients who do not require the service and that patients who would receive no benefit from using the service would go to the trouble of obtaining it. That conclusion is highly implausible. Third, as explained above, the proposed regulation is not narrowly tailored.

In short, the referral-fee ban as drafted would unlawfully chill both commercial and noncommercial speech. If the Commission insists on banning referral fees—a result that is not

¹³ *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980). Although Sorenson reserves the right to argue that a stricter test applies, there is no need to explore that point here because the restriction flunks even intermediate scrutiny.

¹⁴ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1212 (D.C. Cir. 2012) (applying *Central Hudson Gas & Electric Corp.* 447 U.S. at 566 but recognizing the “contrary views” of other courts).

¹⁵ *Edenfield v. Fane*, 507 U.S. 761, 762 (1993) (noting that “a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real”).

¹⁶ *Cf. id.* at 771 (reversing ban on solicitation by CPAs because the regulator “presents no studies that suggest personal solicitation of prospective business clients by CPA’s creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear.”); *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1219 (stating that the government must present “substantial evidence” that the regulation will directly advance its interest—not “mere speculation.”); *see also W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1095 (9th Cir. 2001) *aff’d sub nom. Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (requiring government to proffer “evidentiary support” that regulation directly advances its interests).

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supported by the record—it must revise the proposed rule to clarify that it does not ban all advertising, nor does it ban legitimate marketing tools, such as third-party distribution arrangements and co-operative marketing.

Sincerely,



John T. Nakahata
Christopher J. Wright
Mark D. Davis
Counsel for Sorenson Communications, Inc.